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No. 08-533

IN THE
Supreme Court of the United States

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Petitioners,

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; and TXU CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF

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BASES FOR SUPPLEMENTAL BRIEF

Petitioners CleanCOALition and Robertson County: Our Land, Our Lives (collectively, "CleanCOALition") filed a Petition for Writ of Certiorari (the "Petition") on October 20, 2008. CleanCOALition argued courts, including the lower courts in this matter, have subverted Congress's intended enforcement and operation of the Clean Air Act ("CAA") by:

1. Disregarding that Congress intended CAA section 304(a)(1), 42 U.S.C. § 7604(a)(1), to authorize suit for violations that occur before a person obtains a Prevention of Significant Deterioration ("PSD") permit.[1]

2. Disregarding that Congress intended CAA section 304(a)(3), 42 U.S.C. § 7604(a)(3), to create a cause of action against a person that proposes to construct or constructs a facility without a *valid* permit.

3. Holding courts can use the "abstention" doctrine created in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to dismiss properly filed citizen suits.

One week after CleanCOALition filed its Petition, the United States Court of Appeals for the Seventh Circuit issued an opinion in *Sierra Club v. Franklin County Power of Illinois, LLC*, No. 06-4045, 2008 WL

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[1] The CAA's PSD provisions are found at CAA sections 160-169, 42 U.S.C. §§ 7470-7492.

4693519 (7th Cir. Oct. 27, 2008). The Seventh Circuit: (1) held CAA section 304(a)(3) allows a cause of action when a person proposes to construct a facility with an *invalid* permit and (2) held a person can challenge PSD violations under section 304(a)(3) even *before* a facility is constructed.

These holdings support arguments CleanCOALition asserted in its Petition, and otherwise give rise to circuit conflicts regarding the proper operation of the CAA citizen suit provisions. In this Supplemental Brief, CleanCOALition therefore discusses *Sierra Club* as additional support for its contentions and as an additional basis for the Court to grant CleanCOALition's Petition. *See* Supreme Court Rule 10(a) (indicating the Court may grant review on a writ of certiorari if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .").

SUPPLEMENTAL ARGUMENTS

A. Summary of *Sierra Club v. Franklin County Power of Illinois, LLC*

A PSD permit expires if a recipient does not "commence construction" of a "facility" within eighteen months after the permit is issued, or if the recipient discontinues construction for eighteen months or longer. *See* 40 C.F.R. § 52.21(r)(2). The dispute in *Sierra Club* related to whether a defendant was prohibited from constructing a facility with an allegedly expired, thus invalid, PSD permit.

On July 3, 2001, the Illinois Environmental Protection Agency ("IEPA") issued Franklin County Power of Illinois, LLC ("Franklin Power") a PSD permit to construct a power plant. 2008 WL 4693519 at **1, 2. Franklin Power failed to "commence construction" of its plant within eighteen months, and in the alternative, discontinued construction longer than eighteen months. *Id.* at **9-10. The Sierra Club alleged Franklin Power's PSD permit became invalid. *Id.* at *1. Franklin Power contended the PSD permit remained valid and indicated it still intended to construct its plant with the permit. *Id.* at **5, 9.

The Sierra Club sued Franklin Power under CAA section 304(a)(3), contending Franklin Power was "propos[ing] to construct . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA] . . . ." *See id.* at *1. In defense, Franklin Power contended, *inter alia*, Sierra Club did not have authority to bring a section 304(a)(3) cause of action, because Franklin County had a permit of some kind, *notwithstanding it might be invalid. Id.* at *7. Franklin County also contended Sierra Club's section 304(a)(3) suit was not ripe, because Franklin Power alleged it could not violate any PSD requirements until it actually began constructing its power plant. *Id.*

Franklin Power's challenges to Sierra Club's section 304(a)(3) suit are substantially identical to challenges TXU asserted against CleanCOALition's section 304(a)(3) claims in this matter, and overlap challenges TXU asserted against CleanCOALition's section 304(a)(1) claims. As discussed below, the Seventh Circuit rejected the challenges, and in so doing, effectively

endorsed several of CleanCOALition's contentions in this matter. Moreover, because the United States Court of Appeals for the Fifth Circuit adopted TXU's relevant contentions in this matter, and other circuits have construed CAA section 304(a) like the Fifth Circuit, the Seventh Circuit's holdings create circuit conflicts regarding legal issues that are central to the CAA's proper operation.

B. The Seventh Circuit Has Endorsed CleanCOALition's Contention that Section 304(a)(3) Authorizes Suit against Entities that Propose to Construct Facilities with Invalid Permits

As indicated above, Franklin Power contended section 304(a)(3) does not create a cause of action as long as a person proposes to construct a power plant with a PSD permit of some kind. *See* 2008 WL 4693519 at *7 ("[Franklin Power] argue[s] that the citizen suit provision that Sierra Club relies upon, section [304(a)(3)], only allows suits against entities that are 'without a permit,' so Sierra Club cannot bring this suit because [Franklin Power] received a permit (albeit one that may no longer be valid)"). Franklin Power's contention is materially identical to TXU's "any permit in a storm" contention in this matter.

By way of illustration, the PSD program requires persons to comply with the conditions and requirements found under part C of subchapter I of the CAA (CAA sections 160-169) *before* a person can obtain a *valid* PSD permit. *See, e.g.*, Petition, pp. 7-8, 22 n.18. TXU did not complete the pre-permit, environmental and technical

analyses that correspond with the PSD conditions and requirements. *See* Petition, pp. 8, 12, 24. TXU consequently did not make the necessary "demonstration" that is a prerequisite to a valid PSD permit. *Id.*[2]

CleanCOALition sued TXU under CAA section 304(a)(3), contending TXU was "propos[ing] to construct . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA] . . . ." 42 U.S.C. § 7604(a)(3). TXU challenged the validity of CleanCOALition's suit by arguing section 304(a)(3) provides a cause of action only when a person intends to construct a facility *with no permit at all*, but not when the person proposes to construct a facility with an allegedly invalid permit. *See* Petition, p. 28.

In *Sierra Club*, the Seventh Circuit rejected the nearly identical contention asserted by Franklin Power, because: "even if having an expired [thus invalid] permit were akin to having no permit at all, Sierra Club would still be able to sue under section [304(a)(3)], which enables citizens to sue entities like [Franklin Power] that '*propose[] to construct* . . . new or modified major

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[2] The PSD provisions impose obligations on the person seeking a PSD permit (not just a state agency evaluating whether to issue a permit). The citizen suit provisions therefore are designed to hold accountable persons who fail to fulfill PSD obligations. *See* Petition, pp. 7-8. This, incidentally, was a basis upon which CleanCOALition challenged the application of the *Burford* abstention doctrine in the district court, because citizen suits challenging a person's PSD violations are not matters over which state courts have greater expertise than federal courts. Indeed, there are no identifiable, reported cases in which a CAA citizen suit has been heard by a Texas state court.

emitting facilit[ies] without a [PSD] permit.'" 2008 WL 4693519 at *7 (quoting 42 U.S.C. § 7604(a)(3)).

This holding is particularly germane in this matter, because Franklin Power, like TXU, vigorously defended the validity of its PSD permit. *Id.* at **5, 9-13.[3] The ultimate determination on the validity of the PSD permit was not, however, material in considering whether Sierra Club *pleaded* a viable section 304(a)(3) claim.

Indeed, the Seventh Circuit flatly rejected Franklin Power's contention that a section 304(a)(3) suit could not be viable until the IEPA conclusively determined whether Franklin Power's PSD permit was invalid. *Id.* at **7-8 ("[Franklin Power] cite[s] no direct support for this position, instead claiming the matter is not ripe and cannot be adjudicated until the IEPA issues a final decision whether the . . . permit has expired. . . . It is irrelevant that the IEPA has yet to finish deciding whether the . . . permit is *invalid because that's not what section [304(a)(3)] requires.*") (emphasis added).

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[3] Here, CleanCOALition contended no PSD permit TXU might receive would be valid, because TXU did not fulfill PSD conditions and requirements that are absolute pre-requisites to a valid permit. Accordingly, TXU was not (at the time) defending the validity of a PSD permit that had been issued. TXU instead contended it was not guilty of PSD violations that would invalidate its permit once issued. The holding from *Sierra Club* nonetheless is relevant, because under either scenario, section 304(a)(3) is intended to authorize suit when a plaintiff *alleges* a defendant *proposes* to construct a plant without a valid PSD permit. As discussed below, the actual validity or invalidity of the PSD permit does not have to be resolved before a determination is made whether a section 304(a)(3) claim is proper.

Although the Seventh Circuit ultimately concluded the permit actually was invalid, this was not a necessary pre-condition to its holding that Sierra Club had asserted a viable section 304(a)(3) claim.

Sierra Club therefore stands for the proposition that a person states a viable section 304(a)(3) claim by *alleging* an entity *proposes* to construct a regulated facility without a valid FSD permit. This proposition supports CleanCOALition's contentions regarding the proper operation of section 304(a)(3) and creates a circuit conflict with, at minimum, the Fifth Circuit's contrary holding. *See* Petition Appx. Exhibit A, pp. 22a-23a.

CleanCOALition therefore respectfully submits review on a writ of certiorari is appropriate.

C. The Seventh Circuit Has Endorsed CleanCOALition's Contention that PSD Requirements Can Be Violated and Are Actionable Even before a Facility Is Constructed

A fundamental question that should be resolved in this matter is whether Congress's objectives under the CAA are served by allowing pre-permit suits or whether it is sufficient to limit plaintiffs to filing suit only after a PSD permit has been issued, and a facility has been constructed or become operational. *Cf. Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (holding a court's "duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.") (internal quotations omitted).

CleanCOALition has argued (with respect to both its section 304(a)(3) and 304(a)(1) claims) that the CAA's objectives can be served only if pre-permit suits are allowed. Otherwise, there is no meaningful window of opportunity for citizens to stop persons from constructing non-complaint plants, because (according to some authorities) even before a person obtains a PSD permit, the person can undertake "a good deal of activity" towards construction of a plant. *See, e.g., Hempstead County Hunting Club v. Sw. Elec. Power Co.*, No. 08-CV-4038, 2008 WL 2705570, **2-3 (W.D. Ark. 2008). Accordingly, once a person actually obtains a PSD permit, there may be little time before the plant is completed. At that point, little (if anything) can be done to prevent the plant from operating in a manner that violates the CAA.[4]

In *Sierra Club*, the Seventh Circuit generally acknowledged that meaningful enforcement of the CAA cannot occur unless citizens are allowed to enforce PSD requirements sooner rather than later. *See, e.g.*, 2008 WL 4693519 at *5 ("As a practical matter, it [made] sense for Sierra Club to challenge the validity of [Franklin Power's] permit now, rather than waiting until the plant [became] operational."). Other holdings from *Sierra Club* also support CleanCOALition's contentions regarding the proper operation of CAA section 304(a)(3) and 304(a)(1) and otherwise create conflicts with relevant holdings from other circuits.

[4] The prospect of civil penalties remains, but penalties (although appropriate) will not stop the plant from emitting pollutants at a rate or in a manner that may conflict with PSD mandates. Hence, forever lost is the opportunity to enforce the CAA as Congress intended, i.e., "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1).

1. The Seventh Circuit's holding supports CleanCOALition's construction of section 304(a)(3) and creates a conflict between circuits

As discussed above, Franklin County contended Sierra Club's section 304(a)(3) suit was not ripe, because Franklin Power alleged it could not violate PSD requirements until it actually began constructing its power plant. *See* 2008 WL 4693519 at *7. Here again, this is precisely what is at issue in this matter, because the Fifth Circuit held CleanCOALition's claims cannot be premised on preconstruction PSD conditions and requirements. *See, e.g.*, Petition Appx. Exhibit A, p. 20a ("the Eleventh Circuit has held, following a long line of district court cases, that 'violations of the preconstruction permitting requirements *occur at the time of construction.*'") (emphasis added).[5]

In its Petition, CleanCOALition discussed the flawed reasoning underlying the Fifth Circuit's holding, particularly with reference to the Fifth Circuit's reliance on a case styled *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003). *See* Petition, p. 26 n.23. The Fifth Circuit mistakenly relied on holdings from *Niagara Mohawk Power Corp.* and related cases regarding when a statute of limitations begins to run on a CAA citizen suit, but those holdings offered no

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[5] The Fifth Circuit was addressing CleanCOALition's section 304(a)(1) claim, as opposed to its section 304(a)(3) claim. Regardless, the principle of law, as opposed to the specific statutory provision, is controlling in this analysis, because the principle will inform the operation of both section 304(a)(1) and 304(a)(3). *See infra* pp. 11-12.

insight regarding when a CAA citizen suit becomes ripe (i.e. whether a suit can be based on preconstruction PSD violations). *See* Petition, p. 26 n.23.

In *Sierra Club*, the Seventh Circuit likewise rejected that *Niagara Mohawk Power Corp.* and related cases dictate when suits based on PSD violations become ripe:

> [Franklin Power] misread[s] these cases, which specify when the limitations period begins for claims that a company has violated a preconstruction permitting requirement. In that context, it makes sense to conclude that the *last* possible moment at which a preconstruction violation occurs is "when the actual construction is commenced, and not at some later point in time." . . . . But it does not logically follow (nor do these cases suggest) that a preconstruction permit violation cannot occur *until* actual construction begins.

2008 WL 4693519 at *7.

This holding supports CleanCOALition's contention that PSD violations can occur before a facility is constructed and creates a circuit conflict with, at minimum, the Fifth Circuit's holding to the contrary. *See* Petition Appx. Exhibit A, p. 20a.

2. The Seventh Circuit's holding indirectly supports CleanCOALition's construction of section 304(a)(1) and creates conflicts between circuits

The Seventh Circuit's holding regarding the timing of PSD violations also supports CleanCOALition's contentions regarding the proper operation of CAA section 304(a)(1) and creates circuit conflicts with the United States Courts of Appeals for the Second and Fourth Circuits, as well as the Fifth Circuit. The Second and Fourth Circuits respectively have held PSD conditions and requirements cannot be violated and are not actionable until a CAA facility becomes operational or is at least constructed. *See Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir. 2004); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442, at *8 n.9 (4th Cir. Aug. 17, 1994) (unpublished).

These holdings conflict with the Seventh Circuit's holding that PSD violations can occur prior to construction. Admittedly, the Seventh Circuit was evaluating a section 304(a)(3) claim, whereas in *Weiler* and *Sugarloaf Citizens Association*, the Second and Fourth Circuits where analyzing whether PSD violations could warrant a section 304(a)(1) claim before a power plant began operations or was constructed. This distinction is, however, immaterial, because in both contexts, the fundamental issue is whether PSD requirements can be violated, thus actionable, before a plant is operational or constructed. 392 F.3d at 538; 1994 WL 447442 at *8 n.9. The nature of the section 304(a) suit would not appear to alter that the Seventh Circuit

will allow section 304(a) suits based on preconstruction PSD violations whereas the Second and Fourth Circuits will not.[6]

The Fifth Circuit, in this matter, purportedly declined to address whether it will allow a section 304(a) suit prior to construction of a plant, *see* Petition Appx. Exhibit A, p. 20a n.11,[7] but it (like the Second and Fourth Circuits) did disregard that the CAA is structured such that PSD conditions and requirements create pre-permit obligations that can be violated, and are actionable, before a PSD permit is issued or construction begins.

The Seventh Circuit's holding therefore indirectly supports CleanCOALition's construction of section 304(a)(1), creates a direct conflict with the Second and Fourth Circuit's holdings that PSD violations are not actionable before operations or construction, and implicates a conflict with the Fifth Circuit's holding that pre-permit PSD violations are not actionable. CleanCOALition therefore respectfully submits review on a writ of certiorari is appropriate.

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[6] For instance, in *Sugarloaf*, the PSD conditions and requirements were characterized as emissions standards and limitations as that term is used in CAA section 304(a)(1) and further defined in CAA section 304(f), 42 U.S.C. § 7604(f). In CleanCOALition's section 304(a)(1) claim, it has contended TXU violated PSD conditions and requirements incorporated as emissions standards and limitations under CAA section 304(f)(3). The Seventh Circuit apparently would permit such a claim whereas it would not be permissible under the Fourth Circuit's holding in *Sugarloaf*.

[7] It nevertheless strongly suggested it will not, by holding PSD violations do not occur until construction begins. *See* Petition Appx. Exhibit A, p. 20a.

CONCLUSION

For the reasons discussed in the Petition and raised herein, Petitioners CleanCOALition and Robertson County: Our Land, Our Lives respectfully request that the Court grant its Petition.

Respectfully submitted,

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